Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

DONALD S. EKLUND,

Petitioner,

v.

WHEATLAND COUNTY, AND ITS SHERIFF,
JAMES ROSENBERG,

Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of the State of Montana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Plaintiff was denied due process of law when he was forced to accept a jury in his personal injury law suit all of whom were taxpayers of the Defendant county and who feared they personally would be required to participate in the payment of a very large verdict against the county. Due process is denied if either the Judge or the Jury have a significant financial interest in the outcome. *Aetna Life Insurance Company v. LaVoie*, 475 US 813, 824 (1986). Here the average juror's share was $1,241.63 and the jury foreman's share was $7,334.42 out of his own pocket.

PARTIES

The Petition is Donald S. Eklund.

The Respondents are Wheatland County and its Sheriff, James Rosenberg.

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§3-15-302(2), Montana Code Annotated ("MCA")

> (2) On the trial on an action in which the county is interested, the inhabitants of such county are com-

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petent jurors if otherwise competent and qualified according to law.
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§25-2-201, MCA.
The court or judge must, on motion, change the place of trial in the following cases:
(1) When the county designated in the complaint is not the proper county; (2) when there is reason to believe that an impartial trial cannot be had therein; (3) when the convenience of witness and the ends of justice would be promoted by the change.
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§25-2-126(2), MCA.
(2) The proper place of trial for an action against a political subdivision is in the county in which the claim arose or in any county where the political subdivision is located.
..... 3

§25-7-223(5), MCA.
Challenges for cause maybe taken on one or more of the following grounds:

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> . . . (5) Interest on the part of the juror in the event of the action or in the main question involved in the action, accept the juror's interest as a member or citizen of a municipal corporation;
>
> . . .

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Section 1, 14th Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

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person within its jurisdiction the equal protection of the laws.

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Evidence that a person was or was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests this Court issue a Writ of Certiorari to review the opinion of the Montana Supreme Court entered on July 9, 2009.

OPINION BELOW

The Montana Supreme Court filed its Opinion on July 9, 2009. It is reported at 351 Mont. 370, 212 P.3d 297, 2009 MT 231 (No. DA 08-0329). The same case was previously decided with an Opinion of the Montana Supreme Court dated December 14, 2006 and can be found at 335 Mont. 112, 151 P.3d 870, 2006 MT 333 (No. 04-780).

JURISDICTION

The Montana Supreme Court filed its decision on July 9, 2009. This Court has jurisdiction under 28 U.S.C. §1257(a) to review the decision of the highest Court of a state in which the validity of a statute of any state is drawn into question on the ground of its being repugnant to the Constitution of the United States.

STATEMENT OF NOTIFICATION

Under Rule 29.4(c) 28 U.S.C. §2403(b) may apply and the Attorney General of the State of Montana shall be served with a copy of this Petition. The Attorney General of Montana was notified, pursuant to Rule 27 of the Montana Supreme Court

Rules on July 18, 2008, that Plaintiff intended to challenge the constitutionality of four statutes. On August 21, 2008, the Attorney General served notice of his intent not to intervene.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 1, 14th Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. §3-15-302(2), Montana Code Annotated ("MCA")

> (2) On the trial on an action in which the county is interested, the inhabitants of such county are competent jurors if otherwise competent

and qualified according to law.

3. §25-7-223(5), MCA.

Challenges for cause maybe taken on one or more of the following grounds:

. . . (5) Interest on the part of the juror in the event of the action or in the main question involved in the action, accept the juror's interest as a member or citizen of a municipal corporation;

. . .

4. §25-2-126(2), MCA.

(2) The proper place of trial for an action against a political subdivision is in the county in which the claim arose or in any county where the political subdivision is located.

5. §25-2-201, MCA.

The court or judge must, on motion, change the place of trial in the following cases:

(1) When the county designated in the complaint is not the proper county; (2) when there is reason to believe that an impartial trial cannot be had therein; (3) when the convenience of witness and the ends of justice would be promoted by the change.

6. **Rule 411, MONTANA RULES OF EVIDENCE, LIABILITY INSURANCE**

> **Evidence that a person was or was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.**

WHEN THE FEDERAL QUESTION WAS RAISED.

Upon remand of the case for trial against the Defendant Wheatland County, Plaintiff immediately moved for a change of venue contending that an impartial jury could not be obtained in Wheatland County and that, in view of the amount of Plaintiff's claim, there is no way a taxpayer can be an impartial or unbiased juror in this small county and it would be fundamentally unfair to let such a juror serve on Plaintiff's case. See Plaintiff's Motion for Change in Venue and Brief in Support dated January 8, 2007, App.30-42. In addition, Plaintiff raised the same question in discussing with the Judge in chambers what questions counsel could ask on voir dire, in the Settlement of Instructions which resulted in the rejection of Plaintiff's proposed Instructions, and in chambers on what counsel

would be permitted to say in final closing argument. It was the first issue raised by Plaintiff on appeal to the Supreme Court of the State of Montana.

PROCEDURAL AND FACTUAL BACKGROUND

The Nature of the Case.

Donald S. Eklund was severely injured as he was getting out of his pickup and walking into the barbershop in Harlowton, Montana. R.T., a 13-year-old juvenile who had just escaped from the Yellowstone County Youth Services Center in Billings and stolen his grandfather's pickup was driving at a high rate of speed when he was met by the Wheatland County Undersheriff, Les Christianson just East of Harlowton. Les Christianson turned around and proceeded to chase him into town resulting in a high speed chase through the center of Harlowton, The Trost vehicle slammed into Eklund's vehicle and several others causing Eklund's injuries.

Eklund filed suit against R.T. (the driver of the runaway vehicle), Lynn Hamilton (his mother), Carl Moody, (his grandfather and the owner of the vehicle), Wheatland County and its sheriff (responsible for the hot pursuit through town), Yellowstone County (who let R.T. and his buddy escape), and Donna Marman, the juvenile probation officer in charge of R.T. (who failed to timely notify the local law enforcement officials) and her

employers, Golden Valley, Wheatland County, Meagher County, and Musselshell County.

The Sheriff's Hot Pursuit

At 9:59 a.m., the Wheatland County Sheriff's dispatcher received a report from Musselshell County that there was a stolen 1995 pickup truck headed towards Harlowton. The report included a full description of the vehicle including the license plate number. It identified the possible driver and his companion both of whom had run away from the Yellowstone Youth Service Center in Billings. The Report stated that R.T. maybe headed towards his parents cabin or D.D.'s home, both of which were on the other side of Harlowton.

At 10:05 a.m., the Wheatland County Sheriff dispatcher called all units advising them of an attempt to locate the vehicle stolen in Roundup. The dispatcher received and advised all units twice more of the vehicle's progress towards Harlowton.

Deputy Sheriff Les Christianson heard the initial bulletin but chose to go to a neighboring town on an errand accompanied by an off-duty highway patrol officer, James Rosenberg, (who later was elected Sheriff and substituted as the party Defendant). After the second dispatch they headed in the direction of the on coming vehicle. At 11:11 a.m., Deputy Sheriff Christianson radioed in the report that the suspect vehicle just went by him 3½ miles east of Harlowton heading West. Christianson

immediately turned around and, with his siren and flashing red light turned on, began pursuing the R.T. vehicle. Christianson acknowledged he was going approximately 80 miles an hour.

Another deputy, Officer Craig Clements saw the R.T. vehicle coming at him at a high rate speed. With his overhead lights flashing, Clements crossed over the centerline, "kinda swerving at him" in a feeble effort to make the pickup stop. Clements also had his lights and siren going. When he could see that R.T. was not going to stop, he immediately made a U-turn and proceeded to follow them. Officer Clements commented that the pickup was doing about 100 miles per hour as it came around the corner (into downtown Harlowton). Christianson was right there maybe 100 yards or so behind.

Christianson was unable to catch up with the R.T. vehicle until he was almost into town. After going past the city limits sign at the approximate location of the 45 mph sign, Christianson noticed that he was traveling somewhere between 75 and 80 mph. He also noted that the suspects were not slowing down or pulling over. In his statement to the Department of Justice Criminal Investigator, on the day of the accident, Christianson stated that when he looked down at is speedometer and realized he was going 75 mph into town, "I thought, you know, this is way too fast and there's to many people." In his own Incident Report, Christianson stated "I realized that we were going way too fast in town and that someone was going to get hurt." Rosenberg,

who was riding with Christianson, confirmed that when he looked at the speedometer as they were crossing the bridge (well into town, near where the speed limit dropped from 35mph to 25mph) they were going between 70 and 75 mph, probably closer to 75. At this point, Rosenberg told Christianson "This isn't good."

At about this time, they were between 60 and 70 yards behind the suspect vehicle and Christianson took his foot off the gas. There is no evidence that Christianson attempted to slow down in any other way than taking his foot of the gas. Christianson confirms that he let off the gas one block after the 35 mph sign, near the 25 mph sign which is right near a school on one side of the road and a swimming pool and ballpark on the other. He did admit that he put his foot back on the gas to maintain his speed.

R.T. then attempted to pass another car in front of him which was in the process of making a left turn. He clipped the front end of this car, lost control of the pickup truck he was driving and ultimately struck Donald Eklund in the parking lot as Donald Eklund was getting out of his vehicle to go into the barbershop to get a haircut for his daughter's wedding. The force of the collision was so severe that it pushed two of the parked vehicles through the parking lot and across the street where they came to rest on the westside of Central Avenue. There were a total of five vehicles in the accident including one on the other side of Central Avenue.

It is something of a miracle that Eklund survived because of the huge amount of force with which the speeding vehicle hit Eklund's pickup. Somehow he was thrown into the air and when he came down he landed on the hard pavement in the parking lot after both vehicles had gone underneath him. As Rosenberg stated "when he was hit by the vehicle, I believe I told Les I thought he was dead."

Overwhelming Evidence of Negligence

At trial, Plaintiff produced an extremely well-qualified expert witness on hot pursuits, Richard Dague. Dague, with many years of experience as an officer, an Assistant Chief of Police, a trainer, and a chief instructor for the law enforcement academy in Oregon, teaches and develops programs for master instructors and master instructor courses around the nation. His credentials and list of experience is truly most impressive.

Dague concluded that the sheriff's officers did almost everything wrong. He criticized Undersheriff Christianson for a lack of communication, for failure to plan their next steps, and to execute these steps according to the plan. He indicated there was no preparation even though they had plenty of time to do so. Further, the sheriff officers failed to follow their own training by preventing injury to subjects, people and property. They definitely did not follow their own written policies for hot pursuit. They did not follow their policy on communication. They did not follow their policy on roadblocks. They did not

follow their policy on avoiding risk to other persons and property. He stated they should have backed off and slowed down (not just let up on the gas) when they realized they were going too fast, something they were trained to do. Undersheriff Christianson followed too close - 4-6 car lengths. He says this happens when people "get caught up in their adrenalin and they get to close." Once they had identified the suspects, they should have let them go through the city without incident and either continued the chase on the other side of town or wait until they got to their ultimate destination, a matter that was already known to them.

Richard Dague concluded by stating that there is increased concern in the law enforcement community over hot pursuits. He explained that between 25% and 50% of all law enforcement officers killed in the line of duty involve vehicles, often during hot pursuits.

The evidence of negligence was overwhelming. The facts are generally not in dispute and there was no refutation of Dague's conclusions. Truly impartial jurors certainly would have concluded the Defendant was negligent.

Plaintiff's Injuries and Damages

Eklund's injuries were serious. He was taken by ambulance to the Emergency Room of the Wheatland Memorial Hospital and quickly flown to Billings. He nearly died on the flight to Billings.

Eklund lost his spleen, his pancreas was torn loose, he suffered a collapsed lung, and he suffered numerous serious puncture wounds, including a hole in his shoulder, lacerations, and abrasions. He was in the hospital for 11 days during which he was operated on several times. At the time of his trial, the medical bills totaled $97,923.42. Eklund suffers some permanent damage. His total special damages based on the evidence presented at trial amounted to $579,879.02. These are not exaggerated or over stated as was clearly apparent to the Defendant and jurors alike. If the jury had found the Defendant Wheatland County negligent, it would have been hard pressed to reduce Plaintiff's claim below the $1,375,000.00 that he claimed.

Procedural Disposition

R.T. had a small trust fund of approximately $19,000.00 and Eklund settled with R.T. and his mother, Lynn Hamilton for $20,500.00. The District Court granted summary judgment in favor of Carl Moody, the grandfather, and in favor of Wheatland County and its sheriff for the hot pursuit. A new Judge then granted summary judgment in favor of Donna Marman, the juvenile probation officer. The case then went to trial before a jury in Wheatland County only against Yellowstone County for allowing R.T. to escape.

Following a defense verdict Eklund appealed and asked the Supreme Court to reinstate the case against Wheatland County for hot pursuit. In

Eklund v. Trost, 335 Mont. 112, 151 P.3d 870 (2006), the Montana Supreme Court reversed as to Wheatland County and its sheriff on the hot pursuit issue but affirmed as to the other Defendants. The only remaining Defendant then was Wheatland County and its sheriff, James Rosenberg.

Eklund then moved for a change in venue pointing out that he was seeking damages in excess of $1,375,000.00 from a jury all of whom will be taxpayers of the county that will have to pay the Judgment. His Motion for Change of Venue was denied and all efforts to inform the jury that the taxpayers would not be responsible for the amount of the Judgment because the County was insured were rejected.

A second trial was then held against Wheatland County in Wheatland County before a jury all of whom were taxpayers of Wheatland County. The jury found for Wheatland County on the issue of liability.

Eklund appealed again to the Montana Supreme Court asserting that he was denied his rights under the due process clauses of the Montana and Federal Constitutions because (1) the District Court failed to grant his Motion for Change of Venue; (2) the District Court refused to let the jury consider the source of payment of any verdict; (3) the District Court refused to grant his request to dismiss a prospective juror who acknowledged having some "ingrained prejudices" that "may taint" a decision or

judgment in favor of Plaintiff because he did not know how the judgment would be paid, and (4) that the trial court committed error in refusing to grant Plaintiff's Motion for Judgment on Liability Notwithstanding Verdict or, in the alternative, for a New Trial. The Supreme Court affirmed in a four to one decision on July 9, 2009. (See App.1-19.)

The Jurors

Because property taxes are matters of public record, it is a simple matter to determine the taxable value of each jurors' property.[1] Using the applicable mill levy, the exact amount of the taxes that each taxpayer would pay if Wheatland County had to pay the entire amount of Plaintiff's claim, namely, $1,375,000.00, is relatively easy to calculate. The list of each juror and each juror's share of the Plaintiff's claim amount is listed below:

Jurors	Portion of taxes owed if, $1,375,000 was awarded
Bacon	$ 200.91
Brook	$ 333.34
Borbe	$4,769.15
Frost	$ 80.65
Keller	$ 63.83
Lammers (the foreman)	$7,334.42
Miller	$ 144.77

[1]Every single one of the jury were taxpayers of the Defendant, Wheatland County. Some, such as the foreman, were taxpayers through a farm entity and one was a taxpayer through her spouse.

Moore	$1,151.48
Schuchard	$ 167.21
Sedgewick	$ 348.67
Senior	$ 168.70
Todhunter	$ 136.41

Because of the enormous amount of damages suffered by the Plaintiff, his claim of $1,375,000 was a very solid number. Thus, if the jury found for the Plaintiff and awarded the amount claimed, the average juror would pay $1,241.63 as his or her share of the jury verdict. The foreman was by far the largest taxpayer. His share of Plaintiff's claim would amount to $7,334.42. Erica Borbe's share amounts to $4,769.15. These sums are not de minimus. In a small county, it must be assumed the taxpayers would have a general idea of how much they would have to contribute to pay that County's expenses. These numbers clearly would offer a possible temptation to the average person to forget the burden of proof required to find for the Plaintiff and might lead the average person not to hold the balance nice, clear and true between the parties.

REASONS FOR GRANTING THE PETITION

I.

Forcing the Plaintiff to Accept 12 Jurors, Each of Whom Have a Personal Financial Stake in the Outcome of His Case, Has Denied Plaintiff Due Process of Law as

Guaranteed by the Fourteenth Amendment.

The Montana Supreme Court has decided an important question of federal law that has not been, but should be, settled by this Court. In addition, it has decided and important federal question in a way that conflicts with the relevant decisions of this Court. That decision is the well-settled law that the person or persons sitting in judgment of a litigant's case must not have a direct financial or personal interest in its outcome.

Is There a Possible Temptation?

As stated by Justice Black in *In re: Murchison*, 349 US 133, 136 (1955) under the due process clause no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *Accord, Aetna Life Insurance Co. v. LaVoie*, 475 US 813, 822 (1986). This Court has framed the test as follows:

> Whether the "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'"

Aetna, 475 US at 822, quoting with approval from *Ward v. Village of Monroeville*, 409 US 57, 60 (1972).

The Law is Well Settled as it Relates to Judges

In *Aetna, supra*, an Appellate Judge ruling on a case of insurance company bad faith had a direct personal, substantial, pecuniary interest when he had a similar insurance company bad faith case himself that would clearly be affected by his decision. *Aetna*, 475 US at 822

As stated by this Court in *Tumey v. Ohio*, 273 US 510, 523 (1927):

> It certainly violates the 14th Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

273 US at 523. In that case this Court concluded a system by which an inferior judge (the village mayor) is paid for his services only when he convicts the Defendant is in violation of the due process clause of the 14th Amendment.

Further, this Court held that a mere $12.00 in costs from the appellant, which amounted in the aggregate to about $100.00 a month, is not de minimus. *Tumey v. Ohio*, 273 US at 531-32,

> It is certainly not fair to each Defendant brought before the mayor for the careful

> and judicial consideration of his guilt or innocence that the prospect of such a prospective loss by the mayor should weigh against his acquittal.

273 US at 532. Furthermore, it was not just his personal pecuniary interest but his interest as mayor in the financial condition of the village that was involved. (*Id.* at 533.)

In *Ward v. Village of Monroeville*, 409 US 58-60 (1972), a major part of the village income was derived from fines, forfeitures, costs, and fees imposed by the mayor in the mayor's court. Citing *Tumey v. Ohio*, this Court said:

> The test is whether the mayor's situation is one "which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the Defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused.

409 US at 60. In *Ward*, the mayor's executive responsibility for the village finances was sufficient to deprive the petitioner of a neutral and detached judge in the first instance. (*Id.* at 60, 62.)

Finally, *In re: Murchison*, 49 US 133, 136 (1955), a one man judge-grand jury not only indicted both defendants but then later tried both defendants in open court for criminal contempt and perjury. In

holding that the one man grand jury could not then sit as trial judge, this court stated:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has also endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

Id. See also, *Bracy v. Gramley*, 520 US 899. ("A judge who accepts bribes from a criminal defendant to fix that defendant's case is "biased" in the most basic sense of that word") and *Caperton v. AT Massey Coal Company, Inc.*, 129 S. Ct. 2252, 2259 (June 8, 2009)(the due process clause does not require proof of actual bias but only a serious risk of actual bias).

In *Caperton,* Caperton obtained a $50 million dollar compensatory and punitive damage award against a coal company for fraudulent misrepresentation, concealment, and tortuous interference with existing contractual relations. The President of A.T. Massey Coal Co. realized an appealed to the Supreme Court was imminent and supported an attorney by the name of Benjamin who was challenging an incumbent, Justice McGraw, for election. The President of Massey spent over $3 million dollars in trying to get Benjamin elected and

succeeded. Benjamin then refused to recuse himself from the A.T. Massey Coal Co.'s case came before the Court on appeal. Benjamin joined in a majority opinion reversing the $50 million dollar verdict. This court stated:

> The due process clause has been implemented by objective standards that do not require proof of actual bias.

129 S. Ct. at 2263. Citing *Withrow v. Larkin*, 421 US 35, 47 (1975), this court stated:

> "under a realistic appraisal of psychological tendencies and human weaknesses," the interest "possess such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

Id. Finally,

> We conclude that there is a serious risk of actual bias - based on objective and reasonable perceptions - when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the

> contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amounts spent in the election, and the apparent effect such contribution had on the outcome of the election.

Id.

The Same Logic and Reasoning should Apply to Jurors

There is no reason why this same logic and reasoning should not be applied with equal vigor to jurors as well as the presiding judge or participating justice. The juror is at least, if not more, involved in deciding a litigants case. Jurors sit in judgment of the litigant's facts.

A jury is as much a part of "fair tribunal" as is the judge. *In re: Murchison*, 349 US 133, 136 (1955)("a fair trial in a fair tribunal is a basic requirement of due process"); *Turner v. Louisiana*, 179 US 466, 472 (1965).

Justice Thurgood Marshall spoke of the right of a trial by an impartial jury as lying "at the heart of due process." *Porter v. Illinois*, 479 US 898 (1986)(Marshal dissenting). Chief Justice Waite quotes Lord Coke on the meaning of "impartial" and the importance of being indifferent. Chief Justice Waite concludes that raising a manifest presumption of partiality is sufficient to invoke due process clause

when a juror is involved. *Reynolds v. United States*, 98 US 145, 154-56 (1878).

In *Irvin v. Dowd*, 366 US 717, 721, this Court refers to the concepts of liberty and dignity and worth of every man that comes from English jurisprudence.

> England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury.

Id. Further:

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.

366 US at 722. This Court then states that impartiality is not a technical concept but it is a state of mind. In that case, the Court found the barrage of publicity surrounding the accused arrest affected not only his home county but the adjoining county and required a change of venue to protect his due process rights. 366 US at 725-26.

In *Turner v. Louisiana*, 379 US 466, 472 (1965) this Court quotes from its decision in *In re: Murchison, supra*, "a fair trial in a fair tribunal is a basic requirement of due process. *Id.* It then states:

> The jury is an essential instrumentality - an appendage - of the court, the body ordained to pass upon guilt or innocence.

Id. In that case, evidence that the jury fraternized with two of the leading prosecution witnesses during the trial was sufficient to deny the defendant due process of law. Further, it did not matter that both witnesses denied ever talking to the jurors about the case.

> [I]t would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial... .

379 US at 473.

Finally, see the extensive opinions of this Court in *Morgan v. Illinois*, 504 US 719, 727 (1992), regarding voir dire questions about the death penalty. As it relates to criminal cases, this Court's mandate is clear - due process demands that a jury must stand impartial and indifferent. 504 US at 719, 727.

Jurors in Civil Trials

There is no reason why the same logic and reasoning should not apply with equal force to juries in civil trials. As stated by this Court, in *Thiel v. Southern Pac. Co.*, 328 US 217, 219 (1946).

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.

Id. *Accord, J.E.B. v. Alabama ex rel. T. B.*, 511 US 127, 146, FN 19 (1994), (the equal protection clause prohibits discrimination in jury selection). In *Edmonson v. Leesville Concrete Company, Inc.*, 500 US 614, 630 (1991), this Court stated:

> A civil proceeding often implicates significant rights and interests. Civil juries, no less than their criminal counterparts, must follow the law and act as impartial fact finders.

Id.

Here There Clearly is a Temptation

With evidence that the jurors in Plaintiff's personal injury case were subject to a possible personal tax assessment to Plaintiff's claim of between $63.83 and $7,334.42 (average of $1,241.63), these jurors were manifestly presumed

partial. The average person could not possibly avoid the temptation to rule against the Plaintiff to protect their own pocketbook. Indeed Arville Lammers, the jury foreman, would certainly be concerned about having to contribute $7,334.42 to Plaintiff's judgment. Erica Borbe would be more than a little concerned if she realized she would have to pay $4,769.15 to satisfy Plaintiff's judgment. This is more than a temptation.

To require Plaintiff to accept these jurors is a manifest violation of his due process rights. There is no way he can get a fair trial before an impartial and indifferent jury as is guaranteed to him under the due process clause of the 14th Amendment if the jurors genuinely fear they will be called upon to pay an average of $1,241.63 to satisfy Plaintiff's judgment. Far more than the mere appearance of justice is involved here. This is a serious and substantial direct, personal, and pecuniary interest in the outcome of the case. *Ward,* 409 US at 60; *Tumey,* 273 US at 523, *Aetna,* 475 US at 826. This Court should not turn a blind eye to the obvious. The temptation is overwhelming and obvious. Plaintiff has been denied due process.

Plaintiff's Efforts to Correct the Situation

Plaintiff tried at every step to avoid this predicament. He immediately moved for a change of venue when it became obvious that Wheatland County was the only Defendant left. His motion was denied by the Trial Court citing §3-15-302(2), MCA.

App. 25-29,[Order p.4]. This Montana statute specifically authorizes the inhabitants of a county to be competent jurors even though they may have an interest in the litigation as a taxpayer. The Supreme Court, affirming that decision, specifically cites their prior decisions indicating that the mere fact a party is a taxpayer of the county or district, does not provide a reason for disqualification. (App. 5-8).

This decision by the highest Court of the State of Montana is wrong. To the extend that it is required by statute, the statute is unconstitutional as applied to Plaintiff in this case. While there maybe some cases that are de minimus, when a Plaintiff is faced with a jury, the foreman of which could be required to pay $7,334.42 and the average juror $1,241.63, it is no longer de minimus. It is unconstitutional and has deprived Plaintiff of his due process of law.

It cannot be remedied, as the Montana Supreme Court suggests, by asking each juror whether they can remain unbiased and impartial notwithstanding their interest as a taxpayer. It would be impossible for the average juror to avoid the temptation to rule against the Plaintiff if he or she was required to pay a portion of the judgment of this magnitude . *Aetna*, 475 US at 822.

Next, Plaintiff sought to allow the jury to consider the source of payment for any damages. The Defendant, Wheatland County, was insured by a

government insurance pool, which would have paid most, if not all, of the judgment. Plaintiff asked first to be allowed to mention insurance or the source of payment during voir dire. He was refused. Second, he asked permission to mention insurance and the source of payment during final argument. Again his request was refused. Then Plaintiff also asked for Instructions regarding the source of payment. Again he was refused.

In each case, the Trial Court's denial of Plaintiff's requests were upheld by the Supreme Court, App. 8-12. Justice Patricia Cotter, dissenting, fully appreciated the significance of these requests and would have reversed the case on this point. App. 16-22. While this may not have totally resolved Plaintiff's concern, it certainly would have helped. In any event, the impact of the state action is the same. The state action as upheld by the Montana Supreme Court has deprived Plaintiff of his due process of law.

The severity of the problem was amply illustrated when one of the prospective jurors, Mr. Butts, indicated on voir dire that an "ingrained prejudice" "may taint" his decision or judgment regarding the Plaintiff's claim if he did not know the source of payment for that judgment. App. 16. Notwithstanding Mr. Butts statement, the Trial Court refused to strike this juror for cause thus requiring Plaintiff use one of his peremptory challenges on this juror. The Supreme Court affirmed the District Court's decision. (App. 12-13.

Although see Justice Cotter's strong dissent on this point. (App. 16-21.)

Finally, after the verdict was received, the Plaintiff moved for judgment on liability notwithstanding the verdict or, in the alternative, for a new trial. This post-trial motion was denied and affirmed on appeal. (App. 13-14.) Plaintiff argued that his evidence of negligence was so strong and his evidence of the amount of damages were so fixed that the jury obviously used a verdict in favor of the defense on liability as the easiest way out. By denying liability, even though the evidence was overwhelming, they could avoid the problem of how much money they, themselves, would have to pay. In other words, it was easier to say no liability than to reduce the amount of claimed liability. This would explain why the jury disregarded with the overwhelming evidence of negligence on the part of the Defendant. Nevertheless, the Supreme Court rejected Plaintiff's argument. (App. 15-16.)

Conclusion

Whether by force of statute or the application of the statute by the decision of the Trial Court as affirmed by the Supreme Court, there nevertheless has been state action that has denied Plaintiff's due process of law. A state court of last resort has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

In addition, if the application of due process in determining the impartiality of judges has not yet been extended in exactly the same manner to a jury, the state court of last resort has decided an important question of federal law that has not been, but should be, settled by this Court.

Either way, the Petition for Certiorari should be granted.

DATED this 6th day of October, 2009.

Respectfully submitted,

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